

No. 86-1731.

Supreme Court, U.S.  
FILED

MAY 28 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the  
Supreme Court of the United States.**

OCTOBER TERM, 1986.

BRADLEY W. BEHRMAN,  
PETITIONER,

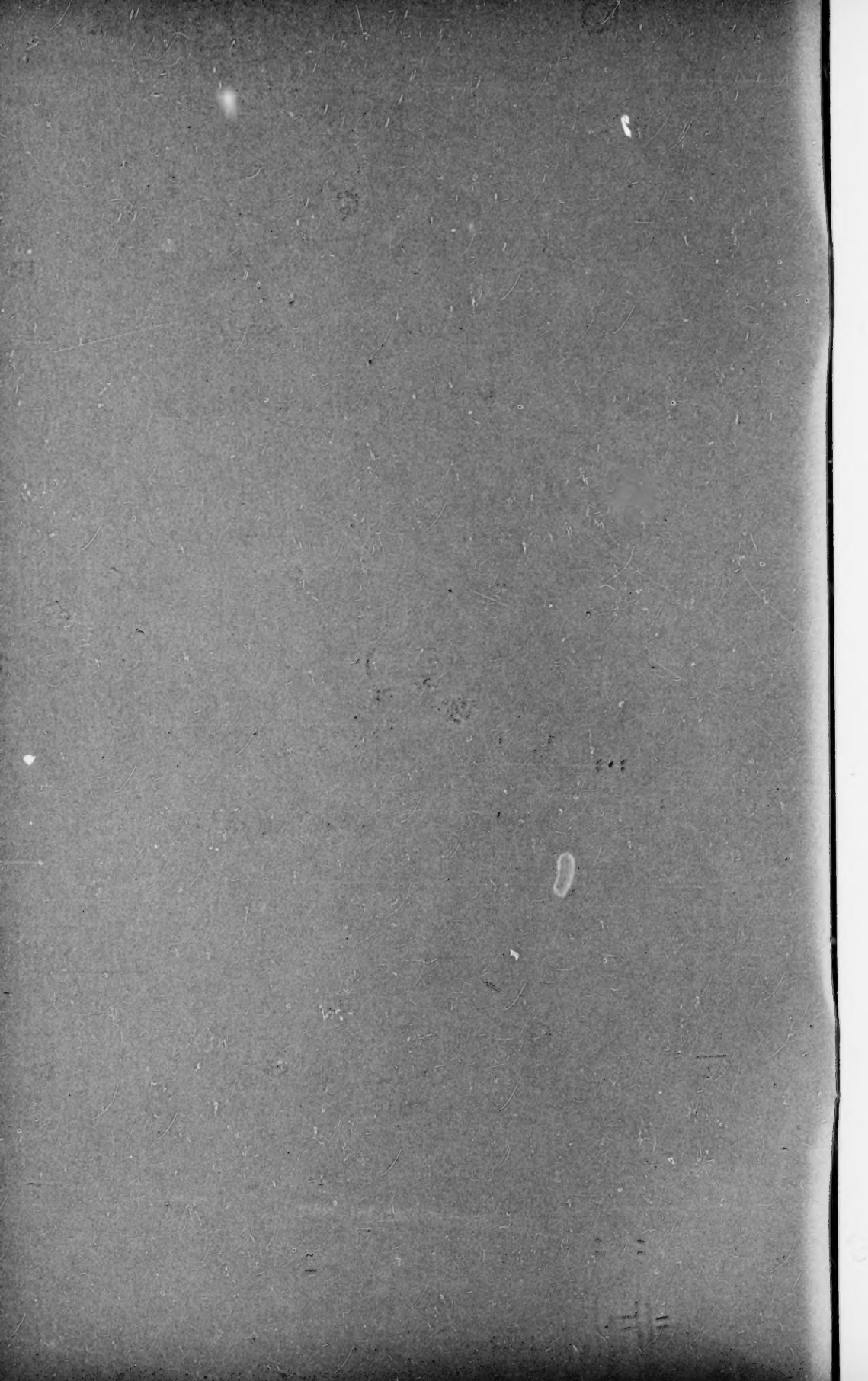
v.

VERONICA L. BEHRMAN,  
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

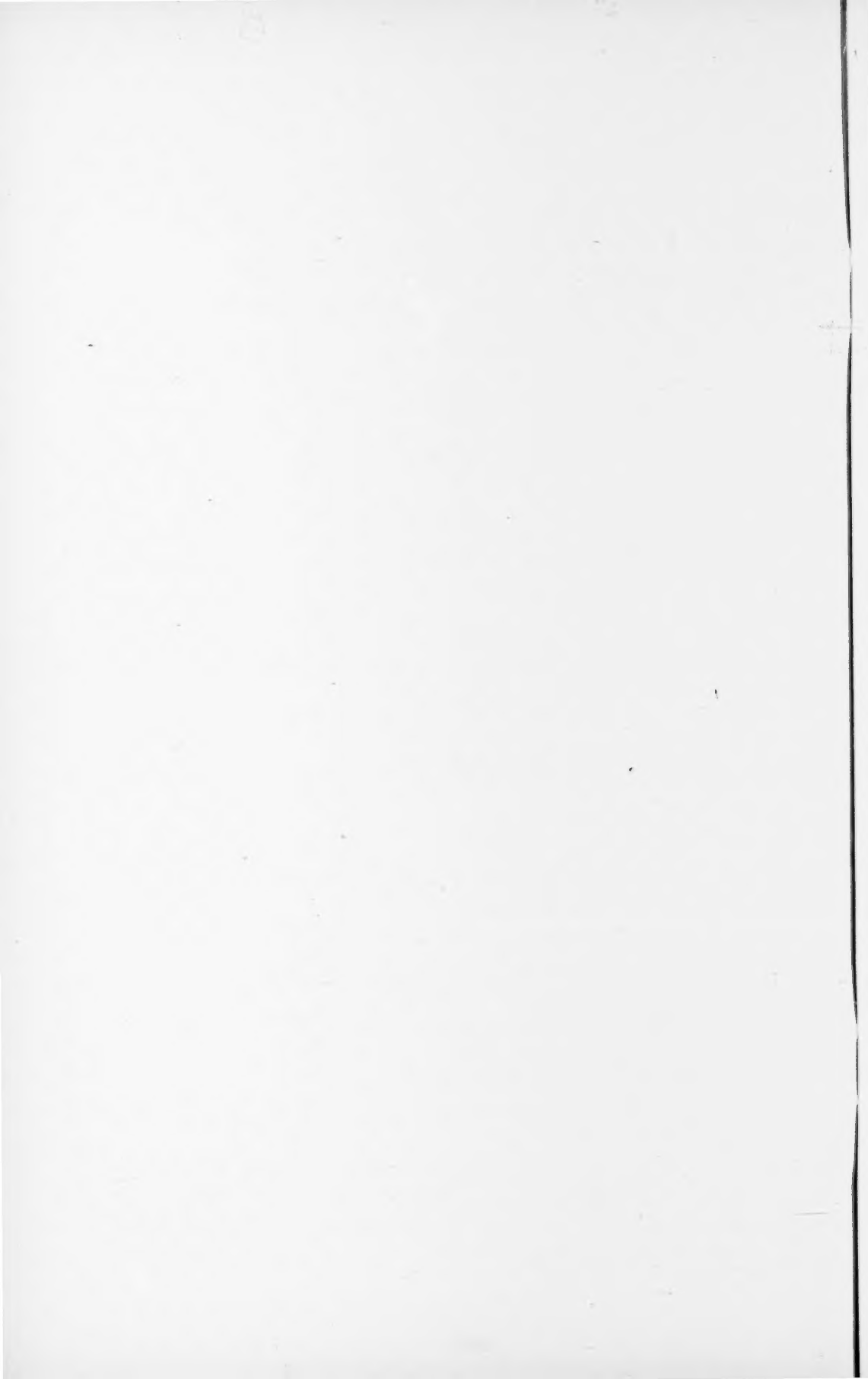
**Respondent's Brief in Opposition.**

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Questions Presented.

- 1.) Is there a deprivation of due process when a defendant in a divorce action, represented by Counsel in the Trial Court, in response to a Motion for Costs filed in accordance with Massachusetts General Law Chapter 208, section 38, after being granted one week to file a response did in fact respond with a Memorandum in Opposition and Cross-Motion for Counsel Fees nineteen (19) days after the original Motion was filed?
- 2.) Is there an unconstitutional deprivation of due process when the Court awards counsel fees on account of the husband's numerous, duplicative and non-meritorious pleadings?



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iii.

<u>Toepfer v. Department of Transportation,</u> <u>FAA, 792 F.2d 1102 (Fed. Cir. 1986)</u>	15
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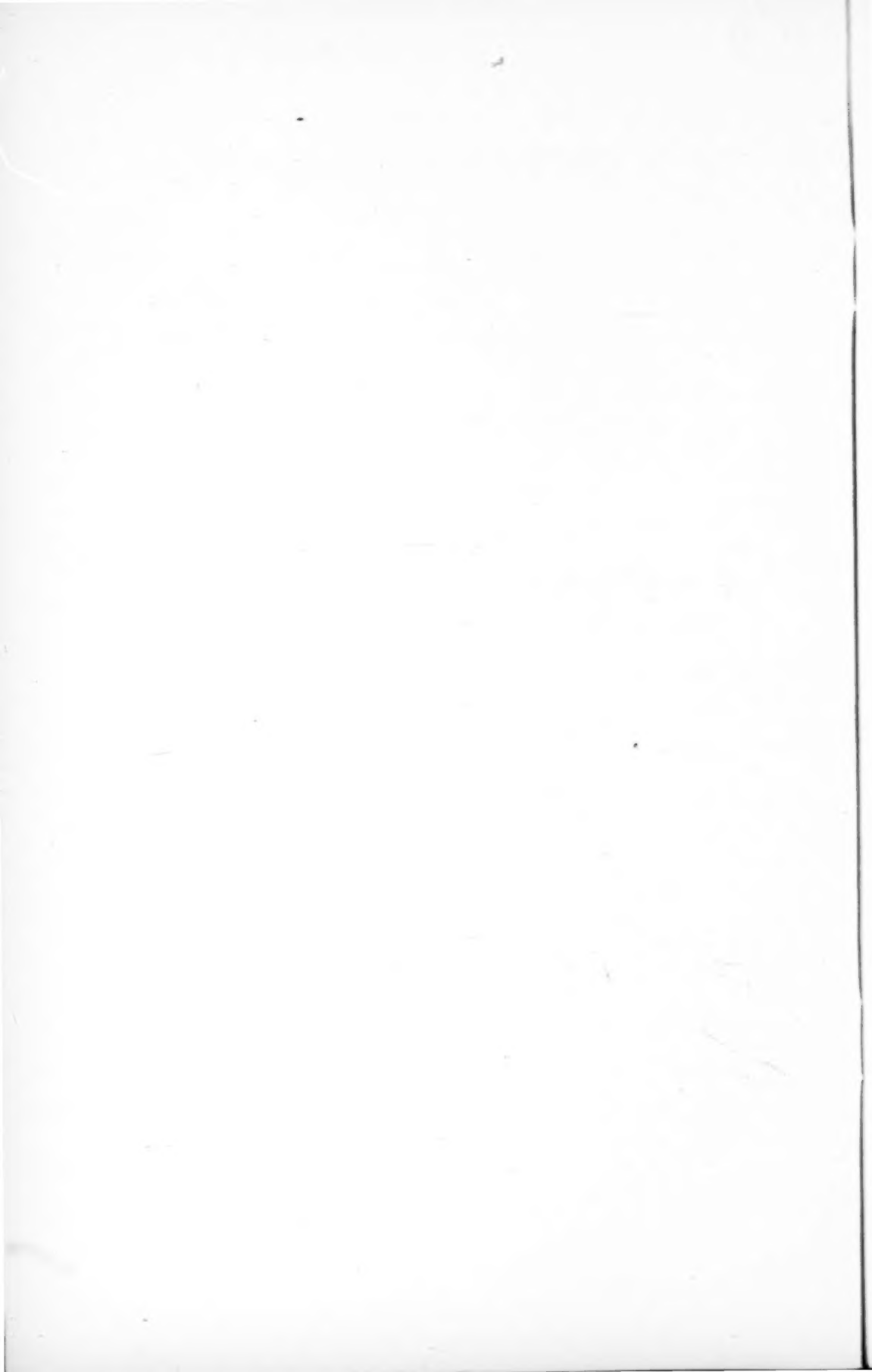
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SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1731

BRADLEY W. BEHRMAN,  
Petitioner,

V.

VERONICA L. BEHRMAN,  
Respondent,

On Petition for a Writ of Certiorari to the  
Supreme Judicial Court of Massachusetts

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below, Prior Order of this Court  
and Jurisdiction

These matters are set forth in the Petition.

Opinions and Judgments delivered in Courts  
Below

The decision of the Appeals Court dated November 28, 1986 affirming the judgment of the Trial Court was reported in 23 Mass. App. Ct. 1104 (1986).

The decision of the Supreme Judicial Court dated January 28, 1987 denying Further Appellate Review was reported in 399 Mass. 1101 (1987).

Constitutional, Statutory and By-Law  
Provisions

The relevant constitutional, statutory and rules of court provisions are set out in the addendum.

Statement of the case

On May 9, 1983 the Respondent commenced this action for Divorce. On October 3, 1985 Judgment Nisi incorporating agreements dated August 12, 1985 and August 14, 1985 was entered together with the further order allowing the Respondent's Motion for Counsel Fees. On October 23, 1985 the Petitioner filed his notice of appeal of the award of Attorneys fees to the Massachusetts Appeals Court.

The Respondent at the trial filed her Motion for Counsel Fees, Affidavit of Counsel as to time and charges and Memorandum in Support of Motion for Counsel Fees. Following receipt of Petitioner's Memorandum dated September 4, 1985, the Respondent filed a further statement in response to the Petitioner's Memorandum.

4.

This case involves the exercise by the Trial Court Judge of a statutory power to award counsel fees. The statute General Laws Chapter 208, section 38 gives the Judge discretion to award costs and expenses to either party or his or her counsel whether the marital relationship has been terminated or not.

The statute is silent on the requirements for notice, formality of hearing and form of judgment.

The standard of review in the State Appellate Court has evolved into well defined criteria and procedures of which the petitioner's counsel in the Court below was well aware and followed.

The respondent's Motion for Counsel Fees was presented to the Court following two days of negotiated settlement prior to trial.

5.

Counsel for the petitioner was afforded one week to file any desired response to the Motion for Counsel Fees and did in fact submit a thirteen (13) page Memorandum in Opposition to respondent's Motion together with a cross-motion for counsel fees which was not allowed.

Review of the decision of the Probate Court by the Appeals Court is limited to questions of law and the trial court's award ordinarily must stand unless incommensurate with an objective evaluation of the services performed. Clifford v. Clifford, 354 Mass. 545, 548 (1968).

The petitioner while represented by counsel made no motion, effort or attempt to request a hearing on the issue of counsel fees.

6.

The Trial Judge who presided at most of the pre-trial motions in this case was uniquely qualified to evaluate the quality and quantity of the petitioner's motions.

The petitioner's statement (B.4-5) supports the statement that petitioner some twenty (20) days after the respondent's motion was filed through his counsel filed both his Memorandum and Motion for Counsel Fees.

The determination of the Trial Judge was made after presentation to him of Affidavits of Counsel documenting legal costs and expenses in excess of \$9,600. The award by the Judge was \$1,425. The petitioner's Motion for Counsel Fees requested the Court to award a total of \$21,807.65 for the petitioner's counsel fees.

ARGUMENT

## I. NO CONSTITUTIONAL QUESTION WAS RAISED BY THE APPELLANT IN THE COURTS BELOW.

In the Trial Court, recognizing the difficulty both Counsel and the Trial Court have in addressing the issue of counsel fees, the Massachusetts Courts many years ago established certain ground rules for determining counsel fees; and by statute it has been left to the Trial Judges' discretion whether or not to award such fees.

The case of Cummings v National Shawmut Bank, 284 Mass. 563, 569 (1933) was cited to the Trial Judge by counsel for the Respondent in a Memorandum supporting the Motion for Counsel Fees.

The same case was cited by the Appeals Court in the Memorandum accompanying its summary dismissal.

8.

The case addresses the criteria to be addressed by the Trial Judge.

The statutes G.L. C.208, s.38 Award of Costs and G.L. C.231, s.6F Costs for Insubstantial or Frivolous Defenses set the authority for the Trial Judge in his discretion to make such award.

Here the Trial Judge certainly did determine in very definite language his reason for his award stating (A. 7-8):

"These fees are awarded primarily, but not exclusively, on account of the husband's numerous, duplicative, and non-meritorious pleadings. . ."

With respect to Counsel Fees the Appellate Courts have so often defined the rule, it is repeated here only as the standard for analysis of the Trial Court action.

9.

"...(T)he court now undoubtedly has power to award costs and expenses, which may include counsel fees and may order them to be paid to counsel for the opposing party."

Hayden v. Hayden, 326 Mass. 587, 594

(1950)

The amount awarded as counsel fees is within the discretion of the court.

Clifford v. Clifford, 354 Mass. 545, 548

(1968)

"As long as the amount awarded is not incommensurate with an objective evaluation of the services performed, and our inspection of the record shows it was not, `(t)he award...may be presumed to be right and ordinarily ought not to be disturbed." (citations omitted)

10.

Ross v. Ross, 385 Mass. 30, 38-39 (1982)

"The award, of course, is not to be changed unless an abuse of discretion on the Judge's part is evident from a demonstration that the amount set is clearly incommensurate with an objective evaluation of the services performed."  
Pemberton v. Pemberton, 9 Mass. App. Ct.

9, 16 (1983)

The criteria to be applied have been enunciated in the case of Cummings v.

National Shawmut Bank of Boston, 284 Mass. 563, 569 (1933) and repeated in Pemberton.

Because the decision of the probate Judge involves an exercise of judgment, in the application of variables, it will be entitled to a large measure of respect on review."

Pemberton, supra at P. 17

Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1023-1024 (1982).

Caldwell v. Caldwell, 17 Mass. App. Ct. 1032, 1035 (1984).

11.

The record in the Appeals Court indicated that the Trial Judge allowed as chargeable counsel fees an amount equivalent to approximately 15% of the Plaintiff's actual counsel fees and stated that the award was made because of numerous, duplicative and non-meritorious pleadings which included repeated motions to take the child out of a parochial school and place the child in a public school (which Judge Kopelman denied), repeated motions to reduce child support, terminate child support, establish criteria for custody and the like which were, with few exceptions, all previously addressed by the same Trial Judge.

Addressing solely the issue of costs, the Trial Court followed every standard prescribed by the Appellate Courts of Massachusetts.

12.

With all due respect to the Appellant's desire to prolong the litigation, the Appeals Court determined that there was no error of law and accordingly there was no basis for appellate review and the Supreme Judicial Court agreed.

II. THE ISSUES OF FACT DETERMINED BY THE COURTS BELOW FORECLOSE THE PETITIONER'S ARGUMENTS.

The Petitioner-Appellant attempts to raise an issue of due process by claiming denial of a hearing.

The Appeals' Court decision stated simply (A.-3):

"We note also that in such cases as this, the Judge is not required to hold an evidentiary hearing."

The cases cited by the Appeals Court refer to circumstances similar to this case where the Trial Judge was at least as familiar with the facts of the case as were counsel and also the parties.

In truth, the Petitioner on the Motion for Counsel Fees was represented by counsel and so stated in his brief (B-4).

"On September 4, 1985, Defendant responded with a Motion of Defendant for Counsel Fees accompanied by a Memorandum in opposition to Plaintiff's Motion and in support of his motion."

Not only was Petitioner represented by Counsel who took twenty (20) days to respond to the Motion for Counsel Fees when the Trial Judge suggested one week; but he also submitted a Motion for Petitioner-Husband's counsel fees which were more than double the Respondent-Wife's Motion for Counsel Fees.

Because of the arguments raised by the Petitioner's opposition brief, Counsel for the Respondent-Wife was allowed to file a reply brief; and only after both parties no longer requested further hearings, did the Trial Judge rule on the Motion. The Ruling, dated October 3, 1985, indicates that twenty-nine days elapsed from the time Petitioner's counsel filed his brief and forty-nine days elapsed from the time the original Motion for Costs was submitted.

Not only was Petitioner represented by counsel, not only did counsel raise every issue Petitioner now contends he should have had the opportunity to raise, but almost seven (7) weeks transpired during this period of time Petitioner contends he was not allowed to contest the Motion.

The fact that was obvious to the Trial Judge, the Appeals Court, the Supreme Judicial Court and virtually everyone save the Petitioner was that he did contest the Motion and having taken his best shot he still lost.

III. THIS COURT HAS DENIED CERTIORARI TO CASES RAISING THE ISSUES CONTAINED IN THIS PETITION.

Lower Courts have routinely determined that there is no denial of due process where there is no hearing on the issues of costs.

Toepfer v. Department of  
Transportation FAA, 792 F2d 1102,  
1103 (Fed. Cir. 1986)

"To require a Hearing for the assessment of such damages and costs would impose on the opposing party and on the Court an even greater burden in dealing with a frivolous appeal and defeat the purpose of Rule 38. See e.g., Hyde v. Van Wormer, \_\_\_\_ U.S. \_\_\_\_, 106 S. Ct. 403, 88 L.Ed.2d 355 (1985)- (Supreme Court awarded damages under its Rule 49.2 without a hearing)."

Very few of such cases rise to the certiorari level. One such case which did and in which certiorari was denied is:

State v. Ralph Williams' Northwest Chrysler Plymouth, Inc., 553 P.2d 423, 87 Wash. 2d 298, cert. denied, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 809 (1976).

17.

Conclusion

For the foregoing reasons, this Petition  
for a Writ of Certiorari should be denied.

Respectfully submitted,

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18.

ADDENDUM

Massachusetts General Laws

Chapter 208

208.38. Costs.

Section 38. In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

COURT RULESAPPEALS COURT RULESRule 1:28. Summary Disposition.

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below.

The panel will provide an opportunity for oral argument before disposing of criminal cases under this rule but need not do so in civil cases. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

RULES OF APPELLATE PROCEDURE

Rule 27. Petition for Rehearing.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to

present. Oral argument in support of a petition will not be permitted, except by order of the court.

No answer to a petition for rehearing will be received unless requested by the appellate court but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the appellate court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is wholly in the discretion of the full court; and the court may award costs, including a reasonable attorney's fee to the prevailing party.

(b) Form of Petition; Length. The petition shall be in a form of a letter to the chief justice of the Appellate Court with seven clear and legible copies, and additional copies shall be mailed by first class mail or delivered to all other counsels. Except by permission of the court, a petition for rehearing shall not exceed ten pages of standard typewritten material.

(c) Revision of Decision. Upon consideration of a petition for rehearing, a majority of the justices of the appellate court may in writing order a decision of the court (or a panel thereof) to be reviewed and revised by a majority of the justices of the court.

Rule 27.1. Further Appellate Review.

(a) Application; When Filed; Grounds.

Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order:

25.

(1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case; (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, if the Appeals Court shall be appended to the application. The application shall comply with the requirement of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why the application should not be granted. The opposition shall not restate matters described in subdivision (b) (2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. Fourteen copies of the application, and fourteen copies of each

opposition shall be filed in the office of the Clerk of the full Supreme Judicial Court.

Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Order of Further Appellate Review; Certification. If any three justices of the Supreme Judicial Court shall sign an order for further appellate review for substantial reasons affecting the public interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, the order or certificate, as the case may be, shall be transmitted to the Clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted.

28.

The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Any party may apply to the Supreme Judicial Court within ten days of the granting of further appellate review for permission to file a separate or supplemental brief in the Supreme Judicial Court. If the application is granted, the court may impose terms as to the length and filing of such brief and any response thereto. If such permission is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs and appendix filed in the Appeals Court.

